ORIGINAL

Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

COMMENTS OF COX CABLE COMMUNICATIONS
A DIVISION OF COX COMMUNICATIONS

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January 27, 1993

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SUMMARY

In devising its rate regulation rules, the Commission must consider all of the goals of the 1992 Cable Act. While assuring low rates for basic service, the Commission must preserve the flexibility of cable operators to respond to competition and to the increasing expectations of the electronic age. It also must consider the financial characteristics of the cable industry, which require a fair return on the enormous investments that cable operators have made in their systems. The Commission also must recognize the fundamental differences between the pervasive regulation of basic rates by franchising authorities and the complaint-driven oversight of cable programming services at the federal level.

Benchmark Regulation of Basic and Cable Programming Services

Once these factors are applied to the regulation of basic rates, the Commission should adopt a benchmarking regime. Benchmarking is superior to cost-of-service regulation, which is far too cumbersome and creates inappropriate incentives for the regulated party. Benchmarking minimizes the burdens on all parties while assuring that any rates below the benchmark are reasonable.

Benchmarking regulation for basic service should use a defined set of criteria to determine the benchmark for each cable system. Initial benchmarks should be based on the number of channels in the system, the number of subscribers served and other factors that are relevant to reasonable rates. Basic service benchmarks should be adjusted to account for inflation, changes in the cost of capital, retransmission consent costs, the costs of franchise requirements and other costs that are outside the cable operator's control. Cable operators

also should be permitted to show that above-benchmark rates for basic service are reasonable based on any relevant factors, including unusual geography, high capital costs, expensive franchising requirements and, particularly, the cost of providing superior customer service.

The Commission can also apply benchmarking to its oversight of cable programming service rates, although benchmarking must be tailored to the requirements of this less-stringent regulatory regime. Cable programming service benchmarks should be based on the overall price for cable service and operators should be given credit for below-cost installation and equipment offerings. Cable programming service benchmarks should be adjusted (1) for inflation, the cost of capital and other costs that affect all cable service; (2) for pass-throughs of costs that affect basic service; and (3) for costs that affect cable programming service directly, including programming, rebuilds, upgrades and system expansion. Cable operators must be afforded unfettered discretion to justify above-benchmark rates for cable programming service, including reliance upon all the factors that apply to basic service as well as unusually expensive rebuilds, new programming costs, and other factors that apply specifically to cable programming services.

Regulation of Equipment, Installation and Change of Service Charges

The Commission's regulation of equipment, installation and change of service charges should be easy to administer while protecting both subscribers and cable operators. The Commission should adopt equipment pricing standards based on appropriate national average equipment costs, accounting for a reasonable return. The regulations for maximum installation charges should not

operate so as to discourage low-cost installations that will make cable service available to more potential subscribers. Change of service charges should be regulated only for basic service so as to avoid unwarranted intrusions on reasonable marketing practices for other services.

Regulation of Leased Access

The Commission should set maximum prices for leased access services that are based on the benchmarks for cable programming services, with exceptions for pay services and other leased programming that may impose additional costs on the operator. The Commission cannot set a lower maximum rate for not-for-profit programmers. The Commission should otherwise limit its regulation of the terms and conditions of leased access to provide the parties with maximum flexibility. Alternative dispute resolution is an appropriate way to address disputes over leased access services.

Procedural and Jurisdictional Issues

The Commission must find that a cable system is not subject to effective competition before rate regulation is permitted under the statute. The certification procedures for basic rate regulation should require franchising authorities to adopt their own regulations before requesting certification. The Commission should encourage joint certifications as a way to reduce administrative burdens. The Commission should establish an expedited pleading cycle for consideration of oppositions to certification requests. Both individual notices and public notice of certification decisions should be issued. The Commission cannot regulate basic rates unless the franchising authority has filed

for certification. Decertification should be automatic if there is agreement between the franchising authority and cable operator.

Within-benchmark rates for basic service should be effective without franchising authority approval, and franchising authorities should have sixty days to consider requests for above-benchmark rates. Franchising authorities should be permitted access to rate-related information only when rates are above the benchmark. Any decision to deny a proposed rate must be made in written form and supported by substantial evidence. Appeals of rate decisions should be made directly to the Commission to avoid inconsistency. Franchising authorities do not have the power to order refunds, but do have other enforcement powers in accordance with their franchise agreements. The Commission should exercise its forfeiture authority where necessary. When the Commission regulates basic service, it should follow procedures similar to those used for regulation by franchising authorities.

The Commission should adopt complaint procedures for non-basic services that minimize the burden on the Commission. Complaints should initially be submitted to the franchising authority for preliminary review and then to the Commission. Complaints should be permitted only during a limited time after a rate change. The cable operator should be required to respond only if preliminary review raises questions regarding the reasonableness of the rate. If there are disputed questions of fact, the Commission must provide a full hearing. The burden of proof should be on the complainant. The Commission should protect any cost information provided by cable operators in response to

complaints. Any refunds that result from complaints should be distributed via reductions in rates.

For systems providing service to multiple franchises, the requirements for uniform rate structures should not apply beyond the individual franchise area. The requirements for uniformity and other rate regulation provisions are not applicable to multiple dwelling units and other special contractual arrangements.

Under the Act, cable operators have the flexibility to place more than the minimum number of channels in the basic tier. Franchise agreements that require specific channels or a minimum number of channels in basic service should, however, be preempted. The Act permits cable operators to require purchase of one non-basic tier as a prerequisite to another non-basic tier. The Act also permits cable operators to offer pay channels and pay-per-view service to customers who do not purchase basic service. Bundling of pay-per-view and per channel services does not violate the requirements of the Act or create a tier subject to rate regulation. Subscription to video services should not be a prerequisite for subscribing to non-video services. Finally, the Commission need not adopt any new regulations to implement the negative option billing provisions of the Act which will be adequately enforced through the complaint process.

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Implementation of Sections	)	MM Docket No. 92-266
of the Cable Television	)	
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Rate Regulation	)	

COMMENTS OF COX CABLE COMMUNICATIONS
A DIVISION OF COX COMMUNICATIONS

Cox Cable Communications ("Cox"), by its attorneys, hereby submits its comments in the above-captioned proceeding.[1/] Cox is the fifth largest operator of cable systems in the United States. It operates a variety of systems in large metropolitan areas, suburbs and rural communities, and has been an industry leader since 1962. As a consequence, Cox brings a wide range of experience in the provision of cable service to this proceeding. That experience has led Cox to the conclusions described herein. For that reason, Cox submits that the Commission should adopt rate regulation policies and rules in accordance with these comments.

1/ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Notice of Proposed Rulemaking,* MM Dkt. No. 92-266 (released Dec. 24, 1992)(the "*Notice*").

I. THE COMMISSION MUST CONSIDER ALL OF THE FOALS OF THE 1992 CABLE ACT WHEN DESIGNING ITS RATE REGULATION SCHEME.

The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act") is not merely a rate regulation law. It was intended to bring a variety of benefits to cable consumers, ranging from low cost basic service to equipment compatibility. In designing rate regulations under the 1992 Cable Act, it is important for the Commission to consider all of the goals of the statute, and not to focus on isolated provisions of the 1992 Cable Act

Considering the 1992 Cable Act as a whole is particularly important for regulation of cable programming services. Efforts to reduce all cable rates to their absolute minimum not only could make it impossible to achieve any of the other goals of the 1992 Cable Act, but would be directly contrary to the 1992 Cable Act's own injunction, discussed in the *Notice*, that the Commission consider a multiplicity of factors, *Notice* at ¶ 31, and would cause irreparable economic harm to the cable industry.

A. Cable Operators' Ability To Improve Service and Respond To Competition Must Not Be Sacrificed To Achieve Low Basic Service Rates.

The availability of a limited package of services that would be generally available to all subscribers at a low cost is one of the primary goals and

achievements of the 1992 Cable Act.[2/] In fashioning its regulatory directives, however, the Commission also must provide cable operators with sufficient flexibility to permit them to continue to improve their services and to respond to other obligations imposed by the new law which will affect their costs of delivering services to consumers. Only if cable operators have the flexibility to improve their service and respond to competition will they continue to serve their customers' needs and desires and provide the technological innovations already beginning to enter the marketplace.

It has long been recognized that the Cable Communication Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (the "1984 Cable Act"), which gave cable operators new freedom to improve their services, led to significant improvements in the availability and diversity of cable service and to a flowering of new and innovative cable programming that responds to the interests of the viewing public. As the Commission explained in its 1990 Cable Report:

2/ *Notice* at ¶ 32. As discussed in Part VII(G), *infra*, the Commission should preempt any franchise requirement for broader basic service. Low-cost basic is only one of several important goals of the 1992 Cable Act, including the anti-buy-through provisions, improved customer service and setting new technical standards.

Besides creating a low cost basic tier for all cable subscribers, the new law: (1) assures that subscribers can acquire equipment at cost; (2) takes steps to make more services available to subscribers on per channel basis, increasing subscriber flexibility to purchase the services they want; and (3) takes steps towards equipment compatibility, helping to reduce customer confusion. *See* 47 U.S.C. §§ 543(b)(1), 543(b)(3), 543(b)(8), 544A.

See also 47 U.S.C. §§ 544(e) (technical standards); 534-535 (must carry); 325(b) (retransmission consent); 552 (customer service). Each of these provisions must be considered as well in devising rate regulation.

"Deregulation under the [1984] Cable Act has fostered the intended results: increases in investment, with corresponding expansion of cable reach, number of subscribers, channel capacity and new programming." *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Television Service,* 5 FCC Rcd 4962, 4971 (1990) (the "*FCC Cable Report*"). The public responded by purchasing more cable service and watching more cable programming. In fact, cable subscribership increased by 18 million households from 1984 to 1991, to a total of 55 million households. National Cable Television Association, *Cable Television Developments*, at 2-A (Oct. 1992) ("*Cable Developments*"). At the same time, viewership of cable-based programming in cable households jumped from 19% to 35% over roughly the same time period. *Id.* at 5-A.

This growth came because cable operators made increasing investments in both cable plant and cable programming. Investment in new and expanded capacity increased by 55% from 1984 to 1989. *FCC Cable Report,* 5 FCC Rcd at 4966. As capacity increased the number of new networks kept pace. The number of cable networks increased from 41 in 1983 to 76 in 1991. *Cable Developments* at 7-A. The substantial investment in improved facilities made more channels available to the average subscriber while improving the quality of the service. The new rate regulations must not be so onerous as to stifle those operators who want to continue this investment trend to improve service quality and reliability.

Cable operators are also faced with increasing competition. Satellite services, including SMATV, already are important competitors in some areas, while MMDS operators provide a wireless alternative to cable. Direct broadcast satellite service, video dialtone services and the recently-proposed LMDS service all will compete with cable in the near future.[3/] This ever-increasing competition means that cable operators must be able to compete both on price and on the quality of the service they provide. If they are not permitted to compete, then the Commission risks all of the progress that has occurred in the cable industry over the past six years. This would be contrary to the goals of the 1992 Cable Act and contrary to the public interest.

The two-tiered regulatory scheme set out in the 1992 Cable Act permits the Commission to give cable operators the flexibility they need. Only basic service is directly regulated, while non-basic service is subject to a complaint process to permit the Commission to make determinations regarding unreasonable rates. As described below, the Commission can adapt a benchmarking proposal to fit both of these regulatory standards. Under this approach, basic service benchmarks will serve to regulate rates, while benchmarks for cable programming services will provide an indicator of when further inquiry is necessary following to a complaint.

3/ Direct broadcast satellite service is likely to begin in the United States within the next several months. *See Echosphere Will Launch DBS Venture that Could Compete with Its Own Market,* Comm. Daily, Jan. 20, 1993 at 4 (describing Direct Tv's plans to launch satellite in early 1993).

While abiding by the 1992 Cable Act's emphasis on simplicity, a flexible approach will ease the burdens of cable operators, franchise authorities, and the Commission as they react to the regulation. In addition, simple regulations will make it easier for consumers to understand their rights while eliminating the unnecessary litigation that would be likely to result from complicated regulations.

B. There Should Be A Transition Period Before The New Rate Regulations Go Into Effect.

The cable industry must have sufficient time to adjust to the new rate regulation scheme, and the Commission itself recognizes that not all implementing steps that cable systems must take to meet the obligations of the statute or its own rules must be completed by April 3, 1993.[4/] The Commission has proposed significant changes in the manner in which systems will be required to conduct their operations, but under the timetable imposed by Congress the industry will not become apprised of the precise regulatory structure and regulations that will be adopted until the Commission issues its Report and Order. The cable industry must be provided sufficient time to adjust its pricing and marketing policies to the new regulatory scheme.[5/]

4/ *Notice* at ¶ 43.

5/ The inability of the industry to comment on the regulations that Commission will adopt poses serious procedural questions under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* To the extent that the industry is not afforded a sufficient time to adjust to the new regulations, this procedural problem is compounded.

Cox proposes that franchising authorities not be permitted to regulate basic service until a period of ninety (90) days from the date the Report and Order is released. During this period franchising authorities and cable operators would have an opportunity to review benchmark levels set by the Commission, and determine whether any adjustments in cable rates are necessary. Complaints alleging that programming service rates are unreasonable would be accepted upon the issuance of the Report and Order, but the Commission would not act on any complaints for a ninety (90) day period. This period would provide the operator with the opportunity to review its rate structure, and make any changes that might render such a complaint moot. This period would also enable the Commission to collect any information from the industry that it determines is necessary to process such complaints.

Finally, the Commission's regulations governing the unbundling of equipment for basic service should not become effective for one year. This pertains not only to equipment such as remotes and converters, but also to inside wiring. Compliance with unbundling requirements will require a major restructuring in the manner in which cable operators price their services and conduct their business.

II. BENCHMARKING WILL MEET THE GOALS OF THE 1992 CABLE ACT'S BASIC SERVICE RATE REGULATION PROVISIONS.

The Commission recognized many of the diverse goals of the 1992 Cable Act in the *Notice*. As the Commission explained, Congress not only set out

specific factors to consider in designing the general parameters of rate regulation, but also required the Commission to ensure that reasonable rates are charged for a particularized small group of services to be designated as basic service and that the administrative burden on subscribers, cable operators and regulators be reduced in the process of fashioning that regulatory scheme. *Notice* at ¶ 30; *see* 47 U.S.C. § 543(b).[6/]

All of these goals must weigh in the regulatory calculus, and the Commission's decisions in one area will inevitably affect how or whether the goals in another area will be met. The Commission should be wary of attempts to give primacy to one or a few of the 1992 Cable Act's provisions and should, instead, make sure that its decisions in this proceeding account for all of the statute's goals.

A. Cost-Of-Service Regulation Is Too Cumbersome.

The Commission is correct in concluding that it should not adopt a cost-of-service model for the rate regulation mandated by the 1992 Cable Act.

6/ In addition to the criteria for basic service, the 1992 Cable Act also specified criteria for rate regulation of cable programming services. These criteria are similar to those for basic service in many ways but afford the Commission substantially more discretion in designing a regulatory regime. *Notice* at ¶ 90; *see* 47 U.S.C. 543(c).

Notice at ¶ 33. Cost-of-service regulation is costly and complicated, and it is not suited to the market structure of cable service.[7/]

First, cost-of-service regulation would impose unwarranted costs and unnecessary complication on cable operators, franchising authorities and this Commission. Establishing and maintaining rates using cost-of-service methodologies would require all parties to gather and interpret enormous amounts of data in order to determine the exact costs faced by each cable system and the proper rate of return for each segment of the cable industry.[8/] For instance, when the Commission undertakes to represcribe the rate of return for telephone companies, the process takes many months, with literally thousands of pages of data submitted by telephone companies and other parties.

This burden would be multiplied enormously under the regulatory regime mandated by the 1992 Cable Act. With individual franchising authorities having the responsibility for basic service rate regulation, literally thousands of different regulators could have to consider the difficult issues raised by cost-of-service regulation. *See* 47 U.S.C. § 543(a). Such a monumental task is contrary

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7/ In the *Notice*, the Commission also asks for comment on a variation on cost-of-service regulation, described as "direct costs of signals plus nominal contribution to joint and common costs." *Notice* at ¶ 53. This approach shares all of the flaws of traditional cost-of-service approaches. In addition, as described by the Commission, it overemphasizes the importance of direct costs in setting reasonable rates, despite the 1992 Cable Act's emphasis on consideration of many different factors.

8/ None of this information is currently available and before any cost-based regulatory scheme could be put into place a uniform system of accounting would have to be designed and implemented nationwide. Even under the best of circumstances delays of one or two years would result.

to the 1992 Cable Act's mandate that "the Commission must seek to reduce the administrative burdens" on all parties. *Notice* at ¶¶ 30, 58.

In addition, cost-of-service regulation would not work for cable television because the structure of the cable industry is radically different from that of the telephone industry or other traditional utilities. Cost-of-service regulation works best when costs are averaged over a large service area. A telephone company with hundreds of millions of dollars in facilities has a wide enough capital base that its costs are relatively stable from month to month and year to year. When costs are not spread over a large capital base, then cost-of-service regulation can lead to enormous fluctuations in prices as capital costs change.

The market characteristics of cable television do not lend themselves to cost-of-service regulation. Cable systems are not state-wide; they are focused on municipalities. Their costs are based on the individual system and vary widely depending upon such factors as the age of the system, physical characteristics of the area and the number of channels in the system. Some of these costs can change yearly, depending upon the characteristics of the market. Moreover, because basic service regulation must be done on a franchise-by-franchise basis, the 1992 Cable Act prevents the Commission from doing anything to group a multiple system operator's facilities and aggregate costs. *See* 47 U.S.C. § 543(l). This means that, for regulatory purposes, cable systems do not resemble the large utilities best suited for cost-of-service regulation.

Thus, the Commission should affirm its tentative conclusion that cost-of-service regulation would be unsuitable for the cable television industry.

B. A Benchmarking Regime Will Balance The Goals Of The 1992 Cable Act.

1. Benchmarking Provides Necessary Flexibility.

While cost-of-service regulation is undesirable, benchmarking, the Commission's other proposed approach, is entirely consistent with the mandates and objectives of the 1992 Cable Act. Benchmarking not only serves the mandate for reduced administrative burdens, but also will help to assure reasonable rates and will give cable operators incentives to assure they operate efficiently.

First, benchmarking will minimize administrative burdens on both cable operators and franchising authorities. Benchmarking will make many basic service rate proceedings largely *pro forma* affairs, requiring only the comparison of the proposed rate to an easily-calculated maximum allowable rate. There will be little or no need for complicated reporting on direct and indirect costs and revenues, or for difficult analyses of expense allocations. Cable operators will not need to justify most rates; franchising authorities will not have to engage in lengthy proceedings to determine if the rates are in fact justified; and there will be fewer occasions on which franchising authorities' regulatory decisions will need to be appealed.

At the same time, benchmarking will help to assure reasonable rates. Properly-defined benchmarks will be congruent with all of the goals of the 1992 Cable Act, which will mean that the rates they permit will be reasonable in relation to the services offered by cable companies. Because benchmarks will set rates that can be exceeded only if justified, their presence will provide guidance to both operators and franchising authorities and eliminate much of the rancor that has accompanied past regulatory experiences. The presumptive validity of rates that are equal to or less than the benchmark also will give cable operators an incentive to maintain their rates at or below that level, if for no other reason than to avoid the time-consuming, expensive process of attempting to justify higher rates.

Finally, benchmarks will give cable operators important incentives toward more efficient operations. If a cable operator is inefficient, it may have difficulty meeting the benchmark, which will force it to go through the more difficult process of obtaining approval for above-benchmark rates. If, on the other hand, a cable operator is efficient, it will benefit from streamlined regulation and the opportunities that lower costs will provide. Thus, benchmarks will make efficient provision of cable service more likely, with the attendant benefits to cable operators and subscribers alike.

2. Specific Benchmarking Regulations Must Be Carefully Designed.

While benchmarking is generally a superior approach to rate regulation, benchmarking will succeed in advancing the goals of the 1992 Cable

Act only if it is carefully designed. As described below, initial benchmarks should be set according to criteria that make them easy to understand and fair to all parties. Once set, benchmarks should be adjusted periodically to account for changes in the costs faced by cable operators,[9/] to cover existing capital obligations and to maintain incentives for future growth in facilities and services. It also is important that operators have flexibility to change below-benchmark prices to respond to changes in the marketplace and as an incentive to improve service. Rules that follow these principles will serve the interests of all parties.

a. Setting Initial Benchmarks.

The Commission's first task is to set the initial benchmarks for basic service on regulated systems. In order for benchmarks to be easily understood and fair to all parties, this process should: (1) set benchmark prices on a per-channel basis; (2) exclude franchise fees, sales taxes and other taxes, fees and assessments from the calculations; and (3) use a limited number of classifications in determining the appropriate benchmarks for cable systems.

It is particularly important to set benchmark prices on a per-channel basis.[10/] The number of channels of basic service offered by cable systems will vary widely, even under the new concept of basic service

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9/ Some examples of new costs can be anticipated even now, including expenses necessary to achieve the new technical standards and the recurring costs that will be required by the proof of performance tests, or the expenses attendant to new customer service obligations.

10/ The measure of the number of channels should be the number of activated channels used to distribute video programming on the basic tier.

contemplated by the 1992 Cable Act. The number of broadcast signals and PEG channels will differ substantially from market to market. In addition, an operator may want to place additional services on the basic tier. Creating a benchmark that minimizes these differences in service would necessarily skew the price for basic service on any given system and could have other unnecessary and unintended effects. This result would not serve the public interest.

Next, benchmark calculations for basic services should exclude franchise fees and any other state or local taxes, fees or assessments, including sales taxes.[11/] These factors will vary widely and their inclusion in the benchmark would be confusing and would complicate application of benchmark numbers to individual systems.[12/]

Finally, limits on the number of benchmark classifications would simplify their administration. Adopting a multiplicity of criteria could make it extremely difficult for cable operators and regulators to determine the proper rate per channel for a given cable system. The Commission should, instead, focus on the characteristics that are most important in distinguishing between different cable systems. Classifications could be based on (1) the number of channels of basic service being provided; (2) the percentage of satellite services among those

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11/ Cable operators have no control over these taxes on cable service, a fact recognized by the 1992 Cable Act in the provisions that permit separate itemization of these and other involuntary costs on subscribers' bills. 47 U.S.C. § 542(c).

12/ Excluding these taxes from the benchmark calculations also avoids complications when a single system serves multiple franchises.